Tio Chee Hing v United Overseas Bank (M) Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NO 08–288 OF 2011(S)
SURIYADI, AHMAD MAAROP, HASAN LAH, ZALEHA ZAHARI AND JEFFREY TAN FCJJ
16 JANUARY 2013

Civil Procedure — Jurisdiction — Federal Court — Whether leave to appeal should be refused — High Court's decision in matter not made in exercise of original jurisdiction — Whether question to be decided in any given case was whether High Court exercised original or appellate jurisdiction and not whether matter before High Court was decided by subordinate court or inferior court — Courts of Judicature Act 1964 s 96(a)

The issue in this matter was whether the applicant should be granted leave to appeal to the Federal Court against a decision of the Court of Appeal which, in turn, depended on whether the decision made by the High Court was in exercise of its original, or its appellate, jurisdiction. Under s 96(a) of the Courts of Judicature Act 1964 ('CJA'), the Federal Court could grant leave only if, inter alia, the decision appealed from the Court of Appeal concerned a civil cause or matter decided by the High Court in the exercise of its original jurisdiction. In the instant case the Assistant Commissioner of Land Revenue had, in foreclosure proceedings, ordered the lands the applicant had charged to the respondent to be sold. The appellant's appeal against that decision to the Director of Land and Survey failed. He appealed to the High Court against the Director's decision and, again, failed. He then appealed to the Court of Appeal but lost in the appeal. In his instant application for leave to appeal to the Federal Court the respondent raised the preliminary objection that leave must be refused as the appellant had failed to satisfy the requirement in s 96(a) that the decision of the High Court in the matter was made in the exercise of its original jurisdiction. The respondent contended the High Court had heard and decided the matter in exercise of its appellate jurisdiction pursuant to s 41(1) of the Sabah Land Code which, inter alia, stated that 'an appeal shall lie from any order or decision of a Collector, Surveyor or Registrar given under this Ordinance to the Director, and again from any order or decision of the Director, whether original or an appeal, to the Court', meaning, the High Court. Section 41(2) further stated that 'Except as herein expressly provided, no Court shall exercise jurisdiction as to any claim or question in respect of which jurisdiction is given by this Ordinance to a Collector or the Director'. The respondent urged the court to follow the Federal Court's decision in *Koperasi Jimat Cermat dan Pinjaman Keretapi Bhd v Kumar a/l Gurusamy* [2011] 2 MLJ 433 ('*Koperasi Jimat Cermat*') instead of the decision in *Yong*

Teng Hing v Walton International Ltd [2011] 5 MLJ 629 ('*Walton International*'). In essence, *Koperasi Jimat Cermat* held that the critical issue to be decided was not whether the matter which came before the High Court was from a subordinate or inferior court (the argument being if the tribunal was not an inferior or subordinate court then the High Court must have exercised original jurisdiction in the matter) but whether the High Court had exercised its original or appellate jurisdiction. *Walton International*, however, took the view that unless the High Court had heard an appeal from the sessions court, magistrate's court or penghulu's court (West Malaysia only) or the legislation that governed the appeal in question expressly conferred appellate jurisdiction on the High Court, the general rule would be that the High Court exercised its original jurisdiction whenever it heard appeals from statutory bodies or inferior tribunals.

Held, allowing the preliminary objection and striking out the leave application:

(1) Regardless of the status of the tribunal, and in this case the Director of Land and Survey, whether it was a subordinate court or an inferior court or not, the critical issue was whether the High Court had exercised its original jurisdiction or appellate jurisdiction when it heard the matter (see para 35).

(2) Pursuant to the provisions of the Sabah Land Ordinance, which was the governing law in the instant matter, the High Court did not hear the matter in exercise of its original jurisdiction. Section 41 of the Ordinance clearly stated that an appeal lay from any order or decision of the Director, whether original or an appeal, to the High Court. It also stated that no court shall exercise jurisdiction as to any claim or question in respect of which jurisdiction was given by the Ordinance to the Director. This barred the High Court from exercising an original jurisdiction thus leaving it only an appellate jurisdiction (see para 33).

(3) *Walton International* appeared to suggest that to determine whether the High Court had exercised original or appellate jurisdiction the Federal Court had to undertake an inquiry into the status of the inferior court to see if it was a subordinate court from whose decision the matter came before the High Court. This view was not acceptable as the Federal Court was never set up to look into factual matters or to be bogged down by exercises that should have been resolved at the High Court stage (see para 32).

(4) The cumbersome exercise of deciding whether a court was an inferior court or not could not take precedence over what was statutorily demanded by s 96 of the CJA. The statutory requirements had to be adhered to unless exceptions were granted by law. The words in s 96(a)

were unambiguous, plain and clear and thus must be given their natural and ordinary meaning (see paras 34–35).

[Bahasa Malaysia summary

Isu dalam perkara ini adalah sama ada pemohon patut diberikan kebenaran untuk merayu kepada Mahkamah Persekutuan terhadap keputusan Mahkamah Rayuan yang, sebaliknya, bergantung kepada sama ada keputusan yang dibuat oleh Mahkamah Tinggi dilaksanakan dalam bidang kuasa asalnya, atau rayuan. Di bawah s 96(a) Akta Mahkamah Kehakiman 1964 ('AMK'), Mahkamah Persekutuan boleh memberikan kebenaran hanya jika, antara lain, keputusan yang dirayu dari Mahkamah Rayuan berkaitan kausa atau perkara sivil yang diputuskan oleh Mahkamah Tinggi dalam pelaksanaan bidang kuasa asalnya. Dalam kes ini Penolong Pesuruhjaya Hasil Tanah telah, dalam prosiding melelong, memerintahkan tanah-tanah pemohon yang telah digadaikan kepada responden itu dijual. Rayuan perayu terhadap keputusan Pengarah Tanah dan Ukur telah gagal. Dia telah merayu kepada Mahkamah Tinggi terhadap keputusan Pengarah itu dan sekali lagi gagal. Dia kemudian telah merayu kepada Mahkamah Rayuan tetapi gagal dalam rayuan itu. Dalam permohonannya ini untuk kebenaran merayu kepada Mahkamah Persekutuan responden menimbulkan bantahan awal bahawa kebenaran tersebut patut ditolak kerana perayu telah gagal memenuhi keperluan dalam s 96(a) bahawa keputusan Mahkamah Tinggi dalam perkara telah dibuat dalam melaksanakan bidang kuasa asalnya. Responden berhujah Mahkamah Tinggi telah mendengar dan memutuskan perkara itu dalam melaksanakan bidang kuasa rayuannya menurut s 41(1) Kanun Tanah Sabah yang, antara lain, menyatakan bahawa 'an appeal shall lie from any order or decision of a Collector, Surveyor or Registrar given under this Ordinance to the Director, and again from any order or decision of the Director, whether original or an appeal, to the Court', yang bermaksud, Mahkamah Tinggi. Seksyen 41(2) selanjutnya menyatakan bahawa 'Except as herein expressly provided, no Court shall exercise jurisdiction as to any claim or question in respect of which jurisdiction is given by this Ordinance to a Collector or the Director'. Responden menggesa mahkamah untuk mengikut keputusan Mahkamah Persekutuan dalam kes *Koperasi Jimat Cermat dan Pinjaman Keretapi Bhd v Kumar a/l Gurusamy* [2011] 2 MLJ 433 ('*Koperasi Jimat Cermat*') dan bukan keputusan dalam kes *Yong Teng Hing v Walton International Ltd* [2011] 5 MLJ 629 ('*Walton International*'). Inti patinya, *Koperasi Jimat Cermat* memutuskan bahawa isu penting yang perlu diputuskan bukan sama ada perkara yang dikemukakan di hadapan Mahkamah Tinggi adalah daripada mahkamah bawahan atau rendah (hujahnya adalah jika tribunal bukan mahkamah bawahan atau rendah maka Mahkamah Tinggi perlu menggunakan bidang kuasa asal dalam perkara itu) tetapi sama ada Mahkamah Tinggi telah menggunakan bidang kuasa asal atau rayuannya. *Walton International*, bagaimanapun, berpendapat bahawa kecuali Mahkamah Tinggi telah mendengar rayuan daripada mahkamah sesyen, mahkamah majistret atau mahkamah penghulu (hanya di Malaysia Barat) atau

perundangan yang mengawal rayuan yang dipersoalkan dengan jelas memberikan bidang kuasa rayuan kepada Mahkamah Tinggi maka rukun am adalah agar Mahkamah Tinggi melaksanakan bidang kuasa asalnya bila ia mendengar rayuan-rayuan daripada badan-badan berkanun atau tribunal-tribunal bawahan.

Diputuskan, membenarkan bantahan awal dan membatalkan permohonan kebenaran:

(1) Tanpa mengira status tribunal, dan di dalam kes ini Pengarah Tanah dan Ukur, sama ada ia adalah mahkamah rendah atau mahkamah bawahan atau tidak, isu yang penting adalah sama ada Mahkamah Tinggi telah menggunakan bidang kuasa asalnya atau bidang kuasa rayuannya apabila mendengar perkara tersebut (lihat perenggan 35).

(2) Menurut peruntukan-peruntukan Ordinan Tanah Sabah, yang mana adalah yang mengamal undang-undang dalam perkara ini, Mahkamah Tinggi tidak mendengar perkara itu dalam melaksanakan bidang kuasa asalnya. Seksyen 41 Ordinan jelas menyatakan bahawa rayuan terletak daripada apa-apa perintah atau keputusan Pengarah, sama ada asli atau rayuan kepada Mahkamah Tinggi. Ia juga menyatakan bahawa tiada mahkamah akan melaksanakan bidang kuasa berhubung apa-apa tuntutan atau persoalan berkaitan bidang kuasa yang mana yang telah diberikan oleh Ordinan kepada pengarah itu. Ini membataskan Mahkamah Tinggi daripada melaksanakan bidang kuasa asal dan oleh demikian ia hanya mempunyai bidang kuasa rayuan (lihat perenggan 33).

(3) *Walton International* dilihat seperti mencadangkan bahawa untuk menentukan sama ada Mahkamah Tinggi telah melaksanakan bidang kuasa asal atau rayuan Mahkamah Persekutuan perlu melakukan siasatan berhubung status mahkamah bawahan untuk melihat jika ia adalah mahkamah bawahan daripada mana keputusan perkara itu dikemukakan di hadapan Mahkamah Tinggi. Pendapat ini tidak boleh diterima kerana Mahkamah Persekutuan tidak pernah bersidang untuk mempertimbangkan perkara-perkara berdasarkan fakta atau dibebani dengan pelaksanaan yang patut diselesaikan di peringkat Mahkamah Tinggi (lihat perenggan 32).

(4) Pelaksanaan rumit untuk memutuskan sama ada mahkamah itu adalah mahkamah bawahan atau tidak, tidak boleh mengatasi apa yang dituntut secara statutori oleh s 96 AMK. Keperluan statutori hendaklah dipatuhi kecuali terdapat pengecualian yang dibenarkan oleh undang-undang. Perkataan-perkataan dalam s 96 AMK adalah tidak taksa, biasa dan jelas dan oleh itu hendaklah diberikan maksud sebenar dan biasanya (lihat perenggan 34–35).]

Notes

For cases on Federal Court, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5224–5239.

Cases referred to

Burhan Ating & Ors v Directors of Land & Surveys & Ors [1992] 2 CLJ 1203, HC (refd)

Cheong Seok Leong v PP [1988] 2 MLJ 481 (refd)

Chung Khiaw Bank (Malaysia) Bhd v Tio Chee Hing [2004] 3 CLJ 59, CA (refd)

Chung Khiaw Bank (Malaysia) Bhd v Tio Chee Hing [1987] 2 MLJ 701, SC (refd)

Darinsok Pangiran Apan & Ors v Hap Seng Consolidated Bhd & Ors [2011] 6 CLJ 733, CA (refd)

G Pattedar v Mahaboob AIR 2005 Kant 377 (refd)

Ismail Yunus & Ors (For Themselves and On Behalf of Ors v Syarikat Kerjasama Perkembangan Tanah Pegagau Berhad & Anor [1994] 4 CLJ 701, HC (refd)

Kesultanan Pahang v Sathask Realty Sdn Bhd [1998] 2 MLJ 513, FC (refd)

Ketua Pengarah Hasil Dalam Negeri v Syarikat Jasa Bumi (Woods) Sdn Bhd (Civil Application No 08–31of 1999(S)), FC (refd)

Koperasi Jimat Cermat dan Pinjaman Keretapi Bhd (now known as Koperasi Keretapi Bhd) v Kumar a/l Gurusamy [2011] 2 MLJ 433; [2011] 3 CLJ 241, FC (refd)

Lau Keen Fai v Lim Ban Kay @ Lim Chiam Boon & Anor [2012] 2 MLJ 8; [2012] 1 CLJ 569, FC (refd)

Nagendra Nath v Suresh AIR 1932 PC 165, PC (refd)

PP v Sihabduin bin Haji Salleh & Anor [1980] 2 MLJ 273, FC (refd)

Tan Sri Eric Chia Eng Hock v PP (No 1) [2007] 2 MLJ 101; [2007] 1 CLJ 565, FC (refd)

Tan Weng Chiang v PP [1992] 2 MLJ 625, SC (refd)

Yong Teng Hing (t/a Hong Kong Trading Co) & Anor v Walton International Ltd [2011] 5 MLJ 629; [2011] 7 CLJ 401, FC (not folld)

Legislation referred to

Co-operative Societies Act 1993 ss 4, 83(1)
Courts of Judicature Act 1964 ss 3, 22, 23, 24, 25, 25A, 26, 27, 28, 29, 30, 96, 96(a)
Federal Constitution art 128(3)
Income Tax Act 1967 s 42, Schedule 5
Legal Profession Act 1976 s 103E
Sabah Land Ordinance (Cap 68) ss 41, 41(1), 111
Subordinate Courts Act 1948 s 3

Appeal from: Civil Appeal No S-02–283 of 2005 (Court of Appeal, Putrajaya)

Firoz Hussein (Pg Amli Ndhin with him) (Nohin & Partners) for the appellant.
Cyrus Das (Frederick Pang with him) (Peter Lo & Co) for the respondent.

Suriyadi FCJ (delivering judgment of the court):

[1] This judgment relates to a preliminary objection raised by the defendant ('the respondent'), regarding a leave application (encl 2(a)) under s 96(a) of the Courts of Judicature Act 1964 ('the CJA') filed by the plaintiff ('the applicant'). The leave application is against the decision of the Court of Appeal handed down on 16 June 2011.

[2] A couple of weeks after the filing of encl 2(a), the applicant filed encl 21(a). Enclosure 21(a) has several prayers inclusive of the prayer for an order that the hearing of encl 2(a) be stayed, that the view of Gopal Sri Ram JCA (as he then was) in *Chung Khiaw Bank (Malaysia) Bhd v Tio Chee Hing* [2004] 3 CLJ 59 delivered on 9 April 2004 be adjudicated as having no effect and that the order of the Court of Appeal delivered through him be set aside, and further that the respondent's counsel be disqualified from representing the respondent in related legal proceedings inclusive of the proceedings in these two enclosures.

[3] The court fixed these two encls of 2(a) and 21(a) to be heard on 5 July 2012 on which date this panel was confronted by a preliminary objection raised by the respondent. Parties agreed that if the preliminary objection were allowed then encls 21(a) and 2(a) would be dismissed; otherwise the hearing of both applications would be heard on their merits. On that understanding we proceeded to hear the preliminary objection.

[4] To appreciate what led to the preliminary objection the facts of the case must be unfolded first.

FACTS OF THE CASE

[5] The applicant was a business man and owned or controlled three companies namely Southern Light Trading Co, Toa Kigyo Co Sdn Bhd and Southern Estates Sdn Bhd. He also was the registered proprietor of 13 pieces of land located at Lahad Datu, Sabah. For his business, banking and overdraft facilities were granted to him by the respondent, previously known as Chung Khiaw Bank. In 1967, a facility of RM1,000,000 was granted to the applicant, secured by a piece of land, and registered on 30 September 1967 as Memorial 90041. Another facility for RM400,000 obtained in 1967 was registered as Memorial 92664 and a third for RM1.4m was registered as Memorial 92666.

[6] As the two facilities of 1967 (secured by Memorial 90041 and Memorial 92664) were not properly serviced the respondent initiated two court proceedings at the High Court against the applicant. Judgments in default of appearance were entered in both suits and no appeal was filed against them.

[7] The third facility suffered the same fate when it was also not serviced, but this time disputed by the applicant unlike the above two facilities. According to the applicant he applied for and obtained an overdraft facility of RM1.4m in 1968 in order to discharge Memorial 90041. To secure the RM1.4m facility, 11 pieces of land were charged. The applicant on the other hand, despite agreeing that the facility was granted, disputed that the RM1.4m was ever disbursed to him. The respondent argued otherwise, and alluded to the two cases of *Chung Khiaw Bank (Malaysia) Sdn Bhd v Tio Chee Hing* and *Chung Khiaw Bank Ltd v Tio Chee Hing* [1987] 2 MLJ 701, to prop up its argument. We will not discuss the issue of disbursement in much detail as it falls within the prayers to be ventilated on the merits of encls 21(a) and 2(a), should the preliminary objection raised not be upheld if and when necessary. Suffice it to say that Gopal Sri Ram acquiescing to the factual finding of the earlier case of *Chung Khiaw Bank Ltd v Tio Chee Hing* [1987] 2 MLJ 701 opined that the matter was res judicata. This view was likewise held by Ian HC Chin J when the matter came up before him for adjudication.

[8] Returning to the general mainstream, the applicant conceded that as the respondent had obtained judgments for the facilities under Memorials 90041 and 92664, and as he was also alleged to have failed to service the facility secured by Memorial 92666, the respondent went before the Assistant Commissioner of Land Revenue ('ACLR') for an order of sale for all the lands charged under those three memorials pursuant to r 14 of the Land Rules. Rule 14 reads:

> 14. Claims to native customary rights shall be taken down in writing by the headman or by the Collector, and shall be decided by the Collector.

[9] The reference numbers of the land enquiries before the ACLR for Memorials 92666, 90041 and 92664 are Land Enquiry No 3/80 (LE 3/80), Land Enquiry 4/80 (LE 4/80) and Land Enquiry No 5/80 (LE 5/80) respectively.

[10] The ACLR proceeded with the hearing of the land enquiries pursuant to s 111 of the Sabah Land Ordinance (Cap 68) and after its completion issued orders for sale of the charged lands. The applicant being dissatisfied, filed appeals only against the decisions relating to Memorials 92666 and 90041 (LE 3/80 and LE 4/80 respectively) to the director of land and survey but lost both appeals. Still not satisfied, the applicant proceeded to file an appeal to the High

Court vide Appeal No 1 of 1981 pertaining to both memorials. After a chequered history, Ian HC Chin J who heard the appeal, dismissed it by ruling that the matter was res judicata ie after having taken into consideration the two cases on the issue of disbursements, namely *Chung Khiaw Bank (Malaysia) Bhd v Tio Chee Hing* [1987] 2 MLJ 701 and *Chung Khiaw Bank Ltd v Tio Chee Hing* [2004] 3 CLJ 59. Being dissatisfied the applicant filed an appeal to the Court of Appeal but similarly failed.

THE PROCEDURAL ROUTE UNDERTAKEN FROM THE ACLR TO THE COURT OF THE APPEAL

[11] The matter of the facilities secured by the three memorials filed with the ACLR (LE 3–5), and culminating with a ruling against the applicant, was a matter that fell under s 111 of the Sabah Land Ordinance (Cap 68). This provision reads:

> 111. If default be made in the payment of the principal sum, interest or periodical payment or any part thereof secured by a charge, or in the observance of any agreement express or implied in such charge, it shall be lawful for the Collector, on the application of the chargee and on being satisfied that such default has been made and has continued for the space of one month after the notice has been served by the chargee upon the chargor, in accordance with rules hereunder to order the sale by auction of the whole or any part of the land comprised in the charge.

[12] The appeal from the ACLR to the director of land and survey is provided for under s 41 of the Sabah Land Ordinance (Cap 68). It reads:

> 41(1)An appeal shall lie from any order or decision of a Collector, Surveyor or Registrar given under this Ordinance to the Director, and again from any order or decision of the Director, whether original or an appeal, to the Court:
>
> Provided that no appeal shall be admitted:
>
> (2) Except as herein expressly provided, no Court shall exercise jurisdiction as to any claim or question in respect of which jurisdiction is given by this Ordinance to a Collector or the Director.

THE PRELIMINARY OBJECTION

[13] Before us the respondent made a twofold preliminary objection on the following grounds:

(a) that the impugned decision was not made by the High Court in the exercise of its original jurisdiction, and therefore a requirement of s 96(a) of the CJA was not met; and

(b) that the impugned decision was not appealable beyond the High Court under s 41 of the Sabah Land Ordinance (Cap 68). A

[14] It is this court's view that if the respondent succeeds with the first ground of objection the need to consider the second objection does not arise; otherwise the second ground is proceeded with. B

[15] The jurisdiction of the Federal Court to hear any appeal is governed by art 128(3) of the Federal Constitution which clearly states that the jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided for by the federal law. For civil matters, the Federal Court's jurisdiction to hear appeals is governed by s 96(a) of the CJA. This provision reads: C

> 96 Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court — D
>
> (a) From any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or E
>
> (b) From any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

F

[16] Here the respondent disputed that the decision of the High Court was pursuant to an exercise of its original jurisdiction. The respondent submitted that as the High Court was hearing an appeal from the Director of Land and Survey under s 41(1) of the Sabah Land Ordinance (Cap 68) it was thus acting in its appellate jurisdiction and not its original jurisdiction. On that premise the respondent canvassed that a fundamental requirement of s 96(a) of the CJA was not satisfied and the two enclosures must be struck out forthwith. G

[17] In the scheme of the CJA, a distinction is made between an appellate jurisdiction and an original jurisdiction. The term 'original jurisdiction', is a reference to 'the jurisdiction to entertain cases in the first instance as distinguished from appellate jurisdiction' (*Aiyar's Major law Lexicon* [2010] Ed Vol 4 4828–29; see also *G Pattedar v Mahaboob* AIR 2005 Kant 377). Matters relating to the original jurisdiction of the High Court ie of matters first commenced by it are found in ss 22–25A of the CJA (*Tan Sri Eric Chia Eng Hock v Public Prosecutor (No 1)* [2007] 2 MLJ 101; [2007] 1 CLJ 565). Whilst for its appellate jurisdiction, the ordinary meaning suggesting the correction of a decision, causing it to be set aside pursuant to a filing of a notice of appeal by an aggrieved party, ss 26–30 of the CJA are relevant (*Nagendra Nath v Suresh* H I

AIR 1932 PC 165). Under ss 26–28 of the CJA the High Court exercises appellate jurisdiction in hearing appeals from subordinate courts. Subordinate court is defined as 'any inferior court from the decisions of which by reason of any written law there is a right of appeal to the High Court (s 3 of the CJA)'. Given the differentiation between the two jurisdictions we shall not discuss this matter any further. Suffice it to say that even the table of contents has delineated the differences.

[18] In support of his submission that the High Court had not exercised its original jurisdiction, the respondent's counsel drew our attention to two conflicting decisions of this court, namely *Koperasi Jimat Cermat dan Pinjaman Keretapi Bhd (now known as Koperasi Keretapi Bhd) v Kumar a/l Gurusamy* [2011] 2 MLJ 433; [2011] 3 CLJ 241, decided by Arifin Zakaria CJ (Malaya) (as he then was) and *Yong Teng Hing (t/a Hong Kong Trading Co) & Anor v Walton International Ltd* [2011] 5 MLJ 629; [2011] 7 CLJ 401 ('*Walton International*'), decided by Richard Malanjum CJSS for consideration. Needless to say counsel for the respondent vigorously submitted that we should follow the path and reasoning of *Koperasi Jimat Cermat dan Pinjaman Keretapi Bhd (now known as Koperasi Keretapi Bhd) v Kumar a/l Gurusamy* ('*Koperasi Jimat Cermat*').

KOPERASI JIMAT CERMAT

[19] The facts of *Koperasi Jimat Cermat* are as follows. The applicant at all material times was a cooperative society registered under s 4 of the Co-operative Societies Act 1993 ('the CSA'). The respondent was the vice president of the co-operative society until his membership was terminated by the applicant. He commenced action against the applicant before the co-operative tribunal, established under s 83(1) of the CSA ('the tribunal'), challenging the validity of his termination. The tribunal found that the termination of his membership was made in breach of the rule of natural justice and ordered that the respondent's membership be reinstated. Aggrieved, the applicant filed an appeal against the award of the tribunal to the High Court. The High Court allowed the applicant's appeal and set aside the whole award of the tribunal with costs. The respondent then successfully appealed to the Court of Appeal and the tribunal's order was restored. The applicant then filed an application for leave to appeal to the Federal Court.

[20] The respondent at the leave application stage, raised a preliminary objection, the issue of whether in an appeal from the tribunal under the CSA, the High Court was exercising its original jurisdiction or its appellate jurisdiction. On behalf of the respondent it was argued that the High Court

was exercising its appellate jurisdiction. That being, so the matter ended at the Court of Appeal and the Federal Court had no jurisdiction to hear the application for leave.

[21] The applicant submitted that the tribunal was not a subordinate court and placed much reliance on s 3 of the Subordinate Courts Act 1948 ('SCA') and s 3 of the CJA. We reproduce the two sections in order to follow the argument of the applicant better. They read as follows:

> Section 3 of the SCA:
>
> (2) There shall be established the following Subordinate Courts for the administration of civil and criminal law —
>
> (a) Sessions Courts;
>
> (b) Magistrates' Courts; and
>
> (c) in West Malaysia only, Penghulu Courts.
>
> Section 3 of the CJA. Interpretation.
>
> 'Subordinate court' means any inferior court from the decisions of which by reason of any written law there is a right of appeal to the High Court and means in relation to the High Court any such court as by any written law has jurisdiction within the local jurisdiction of the High Court.

[22] Without the need to comprehensively repeat the applicant's argument, suffice if we merely state that the applicant held the view that the tribunal did not fall under any of these provisions. As the tribunal was not a subordinate court, the High Court was thus exercising its original jurisdiction entitling the applicant to appeal to the Federal Court.

[23] Arifin Zakaria CJ (Malaya) (As His Lordship then was) disagreed with the applicant and accordingly struck out the leave application. As distilled at held (1) it was concluded that:

> … the appeal made by the applicant to the High Court was made pursuant to s 83(7) of the CSA and instituted by way of originating motion under O 55 r 13 of the Rules of the High Court 1980. The matter thus came before the High Court by way of an appeal and it followed that this application could not come within the ambit of s 96(a) of the CJA. The preliminary objection … was, therefore upheld.

[24] In the course of his judgment His Lordship agreed with the analysis of the unreported decision of the Federal Court in *Ketua Pengarah Hasil Dalam Negeri v Syarikat Jasa Bumi (Woods) Sdn Bhd* (Civil Application No 08–31of 1999(S))('*Syarikat Jasa Bumi*'s case). His Lordship adopted the same view that

whether a tribunal was a subordinate court or an inferior court was not in issue; the critical issue was whether the High Court was exercising its original jurisdiction or appellate jurisdiction.

[25] In that unreported case of *Syarikat Jasa Bumi*, the decision of the Special Commissioners of Income Tax was appealed to the High Court. The issue for consideration at the Federal Court was whether the High Court was exercising its appellate jurisdiction or original jurisdiction when hearing a tax appeal by way of case stated. Chong Siew Fai CJSS stated that:

> … the pertinent question to consider is not so much as to whether the Special Commissioners of Income Tax constituted a subordinate court or an inferior court but rather *whether the judgment of the Court of Appeal sought to appeal against is in respect of a cause or matter decided by the High Court in the exercise of its original jurisdiction*. In other words, the material point is not so much the status of the Special Commissioners sitting in judgment of the assessment made by the director general, but rather the nature of the jurisdiction exercised by the High Court when it heard an appeal from the decision of the Special Commissioners by way of case stated.

WALTON INTERNATIONAL

[26] The facts in *Walton International* are as follows. The registrar of Trade Marks had dismissed the respondent's opposition to the appellant's application for registration of a trade mark identified as 'GORDANO', which the respondent claimed was similar or identical to its trade mark 'GIORDANO', and which it too claimed to have acquired substantial goodwill and reputation locally and abroad. The respondent appealed to the High Court but lost. The respondent then appealed to the Court of Appeal and eventually won. That led to the appellant's application for leave to appeal to the Federal Court against the judgment of the Court of Appeal.

[27] As in the above case of *Koperasi Jimat Cermat* and the current matter before us, at the hearing of the leave application, the respondent raised a preliminary objection as to the jurisdiction of the Federal Court to grant leave application. The respondent ventilated that the matter originated from the decision of the registrar of Trade Marks, which is a subordinate court, and the High Court thus had heard the matter in its appellate jurisdiction. As the High Court had not heard the matter under its original jurisdiction the leave application should be struck out. The Federal Court disagreed with the respondent and dismissed the preliminary objection and accordingly allowed the leave application to be heard. In gist, Richard Malanjum, CJSS speaking on behalf of the panel took a differing view from that of *Koperasi Jimat Cermat.*

[28] Richard Malanjum CJSS opined that:

> … the general rule was that only the sessions court and the magistrates' courts constituted the subordinate courts and the inferior courts. When the High Court heard appeals from tribunals as appeals from the subordinate courts, the exception to the general rule applied as that approach was taken due to the clear provision dictated in the governing legislation.

[29] His Lordship held that:

> Accordingly, the foregoing statutory provisions are clear in that subordinate courts or inferior courts only consist of the sessions court, magistrates' court and Penghulu Courts (west Malaysia only). The registrar of Trade Marks is not included.

[30] Amongst other reasons, His Lordship when commenting and distinguishing the case of *Koperasi Jimat Cermat* with *Syarikat Jasa Bumi*, cited s 42 of the Income Tax Act 1967, Schedule 5. He said, justifying the decision of *Syarikat Jasa Bumi*, the latter provision provided the High Court with the appellate jurisdiction enabling the matter to be treated as an appeal from subordinate courts. His Lordship said it was an exception rather than a general rule. Furthermore, Schedule 5 provides several provisions including sub-s 41 which reads thus:

> 41 There shall be such rights of appeal from decisions of the High Court on cases stated under paragraph 34 as exist in respect of decisions of the High Court on questions of law in its *appellate civil jurisdiction*. (Emphasis added.)

[31] His Lordship remarked that, as there was no similar provision in the CSA in *Koperasi Jimat Cermat* similar to the Income Tax Act provision in *Syarikat Jasa Bumi*, the Federal Court in *Koperasi Jimat Cermat* should have decided that the High court was exercising its original jurisdiction. He opined that 'in the absence of such an express statutory provision, the general rule would apply whereby the High Court would exercise original jurisdiction when hearing such appeals from statutory bodies or inferior tribunals (p 430)'.

[32] Perusing in particular paras 25–26 at pp 640–641 (MLJ); pp 415–416 (CLJ) of *Walton International*, in order to determine the jurisdiction of the High Court when hearing a matter, whether original or appellate, it appears that this court is required to undertake an exercise or inquiry of the status of the inferior court in order to categorise it as a subordinate court, from whose decision the matter was brought to the High Court. Regretfully we are unable to agree with this view as this court was never set up to look into factual matters or to be bogged down by exercises that should have been resolved at the High Court stage.

[33] To fortify our view, s 41 of the Sabah Land Ordinance (Cap 68) clearly

legislates that (similar the Income Tax Act) an appeal shall lie from any order or decision of the director, whether original or an appeal, to the court. Section 4 of this Ordinance provides that 'court' means the 'High Court'. It is succinctly legislated in s 41 that no court shall exercise jurisdiction as to any claim or question in respect of which jurisdiction is given by the Sabah Land Ordinance (Cap 68) to the director. Certainly it bars the High Court from exercising an original jurisdiction thus leaving it only an appellate jurisdiction (*Darinsok Pangiran Apan & Ors v Hap Seng Consolidated Bhd & Ors* [2011] 6 CLJ 733; *Burhan Ating & Ors v Directors of Land & Surveys & Ors* [1992] 2 CLJ 1203; *Ismail Yunus & Ors (For Themselves and On Behalf of Ors v Syarikat Kerjasama Perkembangan Tanah Pegagau Berhad & Anor* [1994] 4 CLJ 701). This strengthens our view that the issue of the two memorials was not heard by the High Court in the exercise of its original jurisdiction but rather in the course of an appeal.

[34] To wind it up, s 96(a) of the CJA requires that before the Federal Court hears an appeal from the Court of Appeal leave must first be obtained from the Federal Court. Procedurally, for it to grant leave on a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage at least two other intertwining preconditions must be satisfied. The first is that the judgment or order handed down by the Court of Appeal must be in respect of an appeal heard by it. Secondly, this provision also requires that the appeal heard by the Court of Appeal must emanate from a decision decided by the High Court in exercise of its original jurisdiction. The cumbersome exercise of deciding whether a court is an inferior court or not, cannot take precedence over what is statutorily demanded by s 96 of the CJA. These are statutory requirements that must be adhered to unless exceptions are granted by law (see s 103E of the Legal Profession Act 1976; *Lau Keen Fai v Lim Ban Kay @ Lim Chiam Boon & Anor* [2012] 2 MLJ 8; [2012] 1 CLJ 569).

[35] The words in s 96(a) are unambiguous, plain and clear and thus must be given their natural and ordinary meaning. It is not for us to invent fancy ambiguities as an excuse not to give effect to its plain meaning or twist and stretch the language beyond its common usage (*Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273; *Tan Weng Chiang v Public Prosecutor* [1992] 2 MLJ 625; *Cheong Seok Leong v Public Prosecutor* [1988] 2 MLJ 481). We agree with the views held by this court that, regardless of the status of the tribunal, and in this case the director of land survey, whether it is a subordinate court or an inferior court or not, the critical issue is whether the High Court was exercising its original jurisdiction or appellate jurisdiction when hearing the matter (*Kesultanan Pahang v Sathask Realty Sdn Bhd* [1998] 2 MLJ 513).

[36] We therefore hold the view that pursuant to the provisions of the Sabah

Land Ordinance (Cap 68), which is the governing law regarding the matter before us, as the High Court was not hearing the matter in exercise of its original jurisdiction, encls 2(a) and 21(a) cannot stand and are thus struck out. With the above reason being sufficient to uphold the preliminary objection the second fold argument raised by the respondent is thus redundant. We now call upon parties to submit on costs.

Preliminary objection allowed and leave application struck out.

Reported by Ashok Kumar